Supreme Court, U.S.
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No. 98-131

In The

Supreme Court of the United States

October Term, 1998

THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Is the requirement in 18 U.S.C. § 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?

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OPINIONS BELOW

The Brief of the United States accurately reflects the opinions below. Copies of these opinions are located in the Appendix to the Petition for Writ of Certiorari ("Pet. App.").

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the final judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The Court of Appeals' decision is dated March 20, 1998, and the court denied the parties' respective petitions for rehearing and suggestions for rehearing *in banc* on June 18, 1998. This Court granted review on the question presented reflected above on November 2, 1998. *See* 119 S. Ct. 402 (1998).

STATUTORY PROVISIONS INVOLVED

This controversy involves the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), which provides in pertinent part:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty- . . . directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned not more than two years, or both.

Congress defined "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which

may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).[1]

STATEMENT OF THE CASE

1. Sun-Diamond is a California agricultural cooperative owned by four individual member cooperatives,[2] which in turn are collectively owned by approximately 5,000 individual growers. The conduct at issue stems from the relationship between Sun-Diamond's former Senior Vice President, Richard Douglas ("Douglas"), and former Secretary of Agriculture Alphonso Michael Espy ("Espy"). As the Court of Appeals recognized, this relationship extended beyond business acquaintances. Pet. App. 2. Douglas "had a long-time friend in Mike Espy – the two had gone to college together at Howard University and had stayed close in the years since." *Id.*; *see also* Joint Appendix filed in Court of Appeals ("C.A.J.A."), Tab 3 at 62, 165, 223, 539, 765-69; Trial Transcript ("Trans.") at 797. The Independent Counsel[3] has acknowledged the legitimacy of this friendship. *See, e.g.*, Brief of the United States ("U.S. Brief") at 4; C.A.J.A., Tab 3 at 963 ("nobody is saying that their friendship wasn't real").

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[1] The gratuity statute, 18 U.S.C. § 201(c)(1), was previously codified at 18 U.S.C. §§ 201(f), (g).

[2] The Court of Appeals erroneously stated that Sun-Diamond is owned by five member cooperatives. *See* Pet. App. 1-2. Only four of the member cooperatives have ownership interests in Sun-Diamond.

[3] On September 9, 1994, the Special Division for the Appointment of Independent Counsels appointed Donald C. Smaltz Independent Counsel to investigate alleged violations of the federal gratuity statute by Espy. *See* 28 U.S.C. § 593(b).

2. On June 13, 1996, a federal grand jury sitting in the District of Columbia, acting at the behest of the Independent Counsel, returned a nine-count indictment against Sun-Diamond. Counts I and II charged that Sun-Diamond, through Douglas, violated the gratuity statute. Count I – the only Count at issue in this appeal – alleged that Sun-Diamond expended about $5,900 on Espy's behalf: $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, $2,427 for luggage, $665 for meals, and $524 for a framed print and a crystal bowl.[4] 18 U.S.C. §§ 2, 201(c)(1)(A); *see also* Pet. App. 4.

The indictment also alleged that two U.S. Department of Agriculture ("USDA") matters affected, among others, Sun-Diamond. Joint Appendix ("J.A.") 10-13. The first matter, the Market Promotion Program ("MPP"), was a USDA grant program designed to increase export sales of U.S. agriculture commodities abroad. According to the indictment, Sun-Diamond "wanted" the USDA to treat Sun-Diamond's member cooperatives as "small-sized entities" under the MPP to enable the cooperatives to receive certain preferences in obtaining MPP funds. J.A. 12. Count I of the indictment, however, did *not* allege any nexus between Sun-Diamond's provision of things of value to Espy and the USDA's position on whether Sun-Diamond's member cooperatives fit within the definition of small-sized entities under the MPP.

The second matter concerned methyl bromide, a "low cost, effective pesticide" used to kill pests and other

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[4] In response to a jury question, the district court instructed the jury to find Sun-Diamond guilty of Count I if the jury found that any one of the gifts constituted an unlawful gratuity. *See* Trans. at 995-99.

insects when planting orchards and fields. J.A. 12. The indictment alleged that Sun-Diamond sought the assistance of the USDA to persuade the Environmental Protection Agency to delay promulgating a rule to phase-out and eliminate the use of methyl bromide "when such rule was formally proposed on or about March 18, 1993." J.A. 13. Sun-Diamond also purportedly "sought to have the [USDA] increase its funding for research for alternatives to methyl bromide in the event that use of methyl bromide were restricted or prohibited." *Id.* The indictment, however, did *not* allege that Sun-Diamond provided things of value to Espy to reward or influence Espy for any action concerning methyl bromide.

3. In fact, aside from merely charging the gratuity offense in generic statutory terms, the indictment did not specifically allege that Sun-Diamond gave gifts to Espy "for or because of" either MPP, methyl bromide or any other official act. Due to this deficiency, Sun-Diamond moved to dismiss Count I on the grounds that the gratuity statute – by prohibiting gifts to public officials "for or because of any official act performed or to be performed by such public official" – requires the prosecutor to allege and to prove some nexus between the alleged gratuities and an "official act." Pet. App. 38-47.

In denying Sun-Diamond's motion, the District Court disregarded the "official act" language, concluding instead that "it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided 'simply *because* of . . . [the] official['s] position, in appreciation of th[e] relationship, or in anticipation of its continuation.'" Pet. App. 42 (alterations and emphasis in original) (citation omitted). In

other words, "[t]he Government must [only] show that Defendant acted simply because of [the public official's] position." *Id.* (citation omitted). "[I]t is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture." Pet. App. 44.

4. It was thus no surprise when the District Court rejected Sun-Diamond's proposed instruction that "giving, offering, or promising things of value to Mike Espy unrelated to the performance of any official act is not prohibited by the gratuity statute,"[5] and instructed the jury that it could convict Sun-Diamond if the company gave things of value to Espy merely to "keep [him] happy" – even if Sun-Diamond did not intend the gifts to relate in any way to any official act:

> Now, to prove the offense of illegal gratuity, the government must prove that the defendant Sun-Diamond knowingly and willingly gave, offered or promised a thing of value to Secretary of Agriculture, Mike Espy, *for or because of his official position.*
>
> * * *
>
> It is required . . . that the government prove that the gratuity was given *because of the public official's position. The gratuity may be given in appreciation for their relationship or in anticipation of its continuation.*

---

[5] *See* Defendant's Proposed Jury Instructions to Which the Government Has Not Agreed at 33 (filed September 9, 1996). The District Court also rejected Sun-Diamond's request that the phrase "for or because of any official act" not be defined for the jury in light of the District Court's finding that the statutory language was clear on its face. Discussion on Jury Instructions (Vol. 7 of Trans.) at 26-27; *see also* Pet. App. at 44-45 n.8.

* * *

The essence of the crime is the official's position of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*

* * *

It is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office.*

* * *

In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy *for or because of Mr. Espy's official government position* and not solely for reasons of friendship or social purpose.

* * *

[T]he government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and [sic] knowingly and willingly gave the gratuities, at least in part, *because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. . . . The government need not prove that the alleged*

gratuity was linked to a specific or identifiable official act or any act at all.

Pet. App. 83-87 (emphases added); *see also* Pet. App. 6-7.

The District Court then summarized the government's burden of proof when instructing that the government had to show merely that Sun-Diamond gave things of value to Espy while the company had matters pending before the USDA:

> In order to sustain its burden of proof for the crime of giving, offering or promising anything of value to the Secretary of Agriculture . . . the government must prove each of the following three elements beyond a reasonable doubt:
>
> First, at the time the gratuity was offered or promised, Michael Espy was a public official or selected to be a public official.
>
> Second, that the defendant, Sun-Diamond Growers of California, acting through Richard Douglas, its then senior vice president for corporate affairs, knowingly and willingly gave, offered or promised something of value to Michael Espy otherwise than as provided by law for the proper discharge of official duty.
>
> Third, the defendant Sun-Diamond Growers of California acting through Richard Douglas, its senior vice president for corporate affairs, did so for or because of an official act performed or [to] be performed by Michael Espy. I will define the term, official act separately.
>
> * * *
>
> *With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture.*

Pet. App. 84-85, 88 (emphasis added).

Therefore, although the District Court instructed the jury that it must find that Sun-Diamond gave things of value to Espy "for or because of any official act performed or to be performed" and read the statutory definition of "official act," the court simultaneously instructed the jury to find Sun-Diamond guilty merely upon a finding that Sun-Diamond gave Espy things of value while the company had matters pending before the USDA. Based upon these instructions, the Independent Counsel argued to the jury that the gratuity statute required the government to prove beyond a reasonable doubt *only* that Sun-Diamond gave Espy things of value for or because of his official position.[6] Consequently, the jury was never given the opportunity to acquit Sun-Diamond if the jury found that the company gave things of value to Espy for or because of his position but *not* for or because of any official act.

On September 24, 1996, the jury convicted Sun-Diamond of Count I, and acquitted Sun-Diamond of the gratuity allegation in Count II.

5. Sun-Diamond appealed, *inter alia*, the Order Denying Sun-Diamond's Motion to Dismiss the Indictment and the gratuity conviction to the United States Court of Appeals for the District of Columbia Circuit. With regard to the gratuity conviction, the Court of Appeals concluded that the "language of the [jury] charge is far broader than that of the statute," and held that the gratuity statute requires a prosecutor to prove beyond a reasonable doubt that the defendant gave the gift to a public official with an intent either to reward one or more "concrete official act[s]" performed or "to

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[6] *See, e.g.*, C.A.J.A., Tab 3 at 964-66; Trans. at 3-4.

increase the likelihood of one or more specific, favorable acts" to be performed:

> To satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts.
>
> * * *
>
> [I]t is enough under the gratuity statute if the defendant gives an unpromised benefit for a past government favor. And . . . a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts. In summary, as we explained in [*United States v.*] *Brewster*, [506 F.2d 62 (D.C. Cir. 1974),] "under the gratuity section, 'otherwise than as provided by law . . . for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made *because of a specifically identified act*." 506 F.2d at 82 (emphasis added).

Pet. App. 7, 8.

The Court of Appeals also rejected the irrebuttable presumption imposed by the District Court that any gift to a public official with the capacity to benefit the donor must necessarily be "for or because of any official act":

> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands – evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before

> his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. *But the terms of the statute require a finding [by the jury] that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.*

Pet. App. 12-13 (emphasis added).

Although it reversed and remanded Sun-Diamond's Count I gratuity conviction due to the District Court's erroneous jury instructions, Pet. App. 31, the Court of Appeals "reject[ed] Sun-Diamond's broad attack on the indictment." Pet. App. 13. The court reasoned that the government does not have to show that a particular gift was earmarked for a single, particular official act. Rather, a gift given for "leniency in a multitude of specific acts was enough":

> That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute – as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely.

Pet. App. 13-14.

On June 18, 1998, the panel denied the Independent Counsel's petition for rehearing, and the full court denied his suggestion for rehearing *in banc*. Pet. App. 32-33. Judge Wald wrote a concurrence to the court's denial of the suggestion for rehearing *in banc*, recommending that this Court decide the gratuity issue. Pet. App. 34.

SUMMARY OF THE ARGUMENT

1. The plain language of the gratuity statute requires the Independent Counsel to prove beyond a reasonable doubt that Sun-Diamond gave Espy things of value "for or because of any *official act* performed or to be performed." 18 U.S.C. § 201(c)(1)(A) (emphasis added). When the District Court replaced the phrase "official act" with "official position," the court precluded Sun-Diamond from arguing – and the jury from finding – that the gifts to Espy were for or because of his official position but *not* related in any way to any official act. In effect, the instructions created an irrebuttable presumption that Sun-Diamond's gifts to Espy were "for or because of any official act" if they had any business purpose whatsoever. The record evidence shows that the gifts may have been given for a multitude of proper business purposes that are not "for or because of any official act."

The Court of Appeals' rejection of the District Court's sweeping instructions is supported not only by the clear statutory language but also by the pertinent legislative history and by the decisions of this Court and other federal circuit courts of appeals. In fact, even the Department of Justice agrees with the Court of Appeals that the gratuity statute requires the *jury* to determine whether the defendant acted with the requisite criminal intent.

2. Sun-Diamond further submits that in addition to affirming the Court of Appeals' decision, the Court should determine the appropriate scope of the gratuity instructions on remand. As the Court of Appeals concluded, by reaching only gifts for or because of official acts "performed or to be performed," the gratuity statute prohibits gifts either to reward past official action or to make certain specific, future conduct more likely. In other

words, despite the claims of the Independent Counsel and the Department of Justice, the statute does *not* criminalize gifts made merely to promote a relationship or to generate sympathy, unless also intended to affect or reward official action.

3. Regardless of the proper scope of the gratuity statute, the ultimate question of the defendant's intent is a question reserved for the jury. The District Court, however, kept this question to itself, thereby precluding the jury from considering Sun-Diamond's intent underlying its gifts to Espy. As Sun-Diamond was denied a fair trial – and might have been acquitted on all of the unlawful gratuity allegations under proper instructions – the District Court's error was far from harmless.

ARGUMENT

I. "For or Because of Any Official Act Performed or to Be Performed" Is Not the Same as "For or Because of the Official's Position."

One does not have to stray far from the question presented here – *i.e.*, whether the phrase "for or because of any official act performed or to be performed" really means "for or because of the official's position" – to discern the proper conclusion. As reflected below, the Independent Counsel's "X equals Y" argument is belied not only by the statute's plain language but also by the pertinent legislative history and ample judicial precedent.

A. The District Court's Instructions Stripped the Jury of its Fact-Finding Function.

As with any statutory interpretation, the resolution of the question presented here turns upon the pertinent

statutory language. Simply, gifts for or because of an official position are not always "for or because of any official act." The jury was thus either asked the wrong question altogether – *i.e.*, whether Sun-Diamond's gifts were for or because of Espy's position – or the District Court established an irrebuttable presumption that any gift from Sun-Diamond to Espy while the company had matters pending before the USDA was necessarily "for or because of any official act." In either case, the District Court erroneously instructed the jury because not all gifts to public officials in a position to benefit the donor are "for or because of an official act."

1. It is an unremarkable proposition that "[i]f the statute is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.' " *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citations omitted); *see also Regions Hosp. v. Shalala*, 522 U.S. 448, 118 S. Ct. 909, 915 (1998); *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1987). This Court has repeatedly underscored the importance of this general rule of statutory construction:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. *We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . .* When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (emphasis added) (citations omitted); *see also Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805, 811-12

(1998); *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 473-74 (1997); *Ardestani v. Immigration & Naturalization Servs.*, 502 U.S. 129, 135 (1991); *cf. Muscarello v. United States*, ___ U.S. ___, 118 S. Ct. 1911, 1923 n.11 (1998) ("It is fundamental . . . that a penal statute is not to be construed generously in the Government's favor.").

The plain language of the gratuity statute belies the Independent Counsel's argument that the phrase "for or because of any official act performed or to be performed" means "for or because of the official's position." Congress defined the term "official act" as "any *decision or action* on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3) (emphasis added); *cf. United States v. Sawyer*, 85 F.3d 713, 735 (1st Cir. 1996) (construing a virtually identical state gratuity statute to hold that "[t]he statute does *not* read 'for or because of the official's position.' Rather, it forbids gratuities motivated by 'any official act' and further defines, rather meticulously, 'official act.' ") (quoting Mass. Gen. Laws ch. 268A §§ 1(h), (k)) (emphasis in original).

By defining "official act" as some "decision or action," Congress did not deem "official position" and "official act" to be synonyms. Although Congress broadly qualified the phrase "decision or action," Congress made clear that to violate the gratuity statute, the defendant must – at a minimum – have given a thing of value to a public official "for or because of any official [decision or action] performed or to be performed."

It *is* true that a gift "for or because of" an official decision or action necessarily is also "for or because of the official's position" because an official act is defined as a question or matter that has occurred or will occur by virtue of the official's position.[7] The converse, however, is not necessarily true because a gift may be "for or because of the official's position," but *not* "for or because of any official act performed or to be performed." As the Department of Justice acknowledges, the gratuity statute does not reach the situation where a donor bestows upon a public official a gift "while remaining indifferent as to the manner in which the recipient's official duties are performed." Brief for the United States Department of Justice As Amicus Curiae ("DOJ Brief") at 14.

The Independent Counsel's argument that the term "official act" really means "official position" fails also because Congress applied the definition of "official act" to the bribery statute. The bribery statute covers situations where a donor "directly or indirectly, corruptly gives, offers or promises anything of value" to a public official with the intent to, *inter alia*, "influence any official act." 18 U.S.C. § 201(b). Substituting "official position" for "official act" in the bribery statute renders that statute meaningless as one cannot corruptly intend to influence an official position.

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[7] *See, e.g.*, Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts I and II, 67 (Comm. Print 1958) ("With minor variations, . . . official act is described as the decision, action, or vote of the recipient in some matter within his official competence."); *see also id.* at 71.

2. The District Court wholly adopted the Independent Counsel's view that if Sun-Diamond's gifts had any business component whatsoever then they *necessarily* were "for or because of any official act." *See, e.g.*, Trans. at 897 (in closing argument, the Independent Counsel argued that "[a]s long as there is a business purpose for each of [the meals] that took place, the Court has instructed that a guilty verdict must be returned"). This statutory interpretation precluded Sun-Diamond from defending the gratuity charge by demonstrating that its gifts to Espy had a business purpose but were *not* connected in any way to an official act.

A gift to a public official may have a business purpose while not being "for or because of any official act." For instance, if a lobbyist pays for a lunch with a public official as a courtesy to gain *access* to the official – *i.e.*, to give information to or receive information from the official – the lobbyist may have given a gift to a public official for reasons unrelated to an official "decision or action" performed or to be performed but nonetheless because of the official's status.[8] In the instant case, Larry Busboom ("Busboom"), Sun-Diamond's former President, testified that Douglas "as a courtesy [would] pick up the

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[8] *Cf. Sawyer*, 85 F.3d at 731 n.15 ("We do not think that the desire to gain access, by itself, amounts to an intent to influence improperly the legislators' exercise of official duties. The government points to no legislative duty to provide equal access to all members of the public; and, from a practical standpoint, we doubt one exists."); *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) ("granting or denying access to lobbyists based on levels of campaign contributions is not an 'official act' [sufficient to] form the basis for a charge of extortion or attempted extortion under the Hobbs Act") (citing *McCormick v. United States*, 500 U.S. 257, 272-73 (1991)).

tab" when dining with Espy. C.A.J.A., Tab 3 at 163. Busboom testified that Douglas' "gifts" – *i.e.*, the free meals – were unrelated to "any official act":

> I think the entree to Secretary Espy was used to the benefit of our business. Again, being aware of what proposed regulations coming down the pipeline were, proposed legislation, anything of a general agricultural matter, it was important for Mr. Douglas to be on top of that. That was his job here in Washington. He was our ears and our eyes.

Id. at 164. A properly instructed jury could have found that Sun-Diamond did not violate the gratuity statute when it approved such gifts because they allowed Douglas "to maintain his information network, to make sure he was aware of any proposed regulations, legislation coming down the pipeline, [and] to be generally aware of what was going on." C.A.J.A., Tab 3 at 163; *see also id.* at 134, 163-64; Trans. at 899.

Douglas was, as any effective lobbyist would be, concerned with relaying pertinent USDA and other information to Sun-Diamond to enable the company to be well-informed and to react appropriately. There was no better place to learn of pertinent USDA events than from the Secretary of Agriculture himself. And in addition to fostering Douglas' information network, his "gifts" to Espy allowed Douglas to be seen with the Secretary of Agriculture, thus "enhanc[ing] Mr. Douglas' stature in the community here in Washington." C.A.J.A., Tab 3 at 165. This, in turn, made "him more effective" as a lobbyist because Douglas, through Espy, was introduced to, and taken seriously by, other high-level government officials. *Id.*

While the Independent Counsel would have this Court, and most certainly the jury, believe that lobbyists have a single function – to influence government officials in the exercise of their authority – the reality is quite different. The primary function of a lobbyist is to keep the client well-informed, enabling the client to make educated business decisions. In such instances, the only "acts" to be influenced are those of a private, commercial nature, not official acts of government employees. That is not to say that lobbyists never seek to influence official acts – but so long as that is not a lobbyist's *only* function, it may not be *presumed* that a gift from a lobbyist is given for or because of an "official act." Mere networking or information gathering cannot be fairly described as "for or because of any official act." The plain language of the gratuity statute requires the jury to determine in furtherance of which objective the gift was given.

The Department of Justice – in stark contrast to the Independent Counsel's position – concedes that the Court of Appeals' decision "is consistent with" the Department's view that the gratuity statute requires *the jury* to determine the ultimate question of the defendant's intent:

> As with any element of a criminal offense, the defendant's mental state may be proved by circumstantial as well as by direct evidence. Where a thing of value is given to a government official who has the authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, based on that relationship alone, that the gift was made "for or because of" the potential future exercise of official power or influence. *Although the jury is not required as a matter of law to draw that inference, it is generally allowed to do so; and a guilty verdict returned by a*

> *properly instructed jury on the basis of such evidence may not be set aside.*

DOJ Brief at 12-13 (emphasis added); *see also id.* at 22 n.8 ("Taken as a whole . . . the [Court of Appeals'] opinion is consistent with our approach."); *id.* at 13-14.[9]

3. While the district court initially substituted the term "official position" for "official act," thereby diminishing the intent element of the offense, the court subsequently deleted the intent element altogether. Indeed, perhaps the most egregious jury instruction error – not even addressed or referenced by the Independent Counsel – was the following:

> With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had matters pending before the United States Department of Agriculture.

Pet. App. at 88. According to this standard, which the Independent Counsel strenuously defended in the Court of Appeals,[10] Sun-Diamond was guilty of providing unlawful gratuities if it gave gifts to Espy while it had

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[9] Sun-Diamond agrees with the Department of Justice that gifts to a public official by an entity regulated by the official might provide circumstantial evidence that the gifts were given "for or because of any official act." *See* DOJ Brief at 22-24. But the District Court's elevation of such "circumstantial evidence" of unlawful intent to a dispositive finding of guilt expanded the gratuity statute well beyond its language and, most significantly, denied Sun-Diamond a fair trial.

[10] *See* Brief for Appellee filed in Court of Appeals ("C.A. Opp. Brief") at 16 ("The Government was properly allowed to prove that the gratuities were given for or because of official acts by showing that Sun-Diamond gave them while it had important issues for decision before the Secretary."); *see also id.* at 15-17.

matters pending before the USDA – regardless of whether the gifts were for or because of an official act, or for or because of an official position, or for any other purpose. The district court thus stripped the offense entirely of its principal element – some proscribed intent.

Under this standard, the parties involved in the following hypotheticals could be held criminally strictly liable under the gratuity statute – which carries a sentence of up to two years in jail – unless the gifts were given entirely out of friendship: (1) a handmade sweater given by a senior citizen to her Representative, who will soon vote on social security reform measures; (2) a gift of flowers from a litigator to a local judge – before whom the donor's law firm has cases pending – because the judge recently suffered the loss of a loved one; and (3) a large candy manufacturer which has applications pending before multiple agencies of the United States gives a jar of jelly beans to the President of the United States, who has publicly acknowledged that he occasionally craves that type of candy. In each of these hypotheticals, the gift was given to a public official who was "in a position to take official action affecting the donor." U.S. Brief at 17. But the gifts could have been given out of respect for the official's position, or, as in the case of the candy manufacturer, as an advertising or a public relations gimmick – *i.e.*, not for "any official act." *See also* Pet. App. 10-11 (Court of Appeals posits its own hypothetical illustrating the flaws in the Independent Counsel's argument).

4. The Court of Appeals' decision does not preclude, as the Independent Counsel argues, "prosecutions for the giving of gifts to, or receipt of gifts by, a person selected to be a public official." U.S. Brief at 26. In fact,

the Court of Appeals' reading of the statute does proscribe and criminalize gifts intending to reward, for instance, a Cabinet nominee for an act he has committed to take upon assuming his office, and further proscribes and criminalizes gifts intending to make a specific act more likely, again, upon a nominee assuming office.

Moreover, the Independent Counsel's discussion – which spans several paragraphs – construing the term "any" as it appears several times in the gratuity statute only diverts the Court's attention from the question presented here. *See* U.S. Brief at 21-23. No matter how many times the term "any" is used in the statute, it does not expand the scope of the criminal prohibition beyond its plain language. Sun-Diamond has never contended, nor does it now contend, that the gratuity statute applies only to specific types of official acts; a gift to a public official for or because of *any* official act (or *any* official decision or action) performed or to be performed is proscribed.

5. The Independent Counsel mistakenly accuses the Court of Appeals of "equat[ing] the offense of giving forward-looking gratuities to the far more serious offense of bribery." U.S. Brief at 16. The Court of Appeals made no such error. Instead, the Court of Appeals correctly recognized that bribery requires "a more exacting showing of intent" than the gratuity statute. Pet. App. 7; *see also* § 201(b)(1)(A). This Court has explained that "corrupt intent" as used in the bribery statute means an intent to receive a specific benefit in return for the bribe:

> An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of

> either financial gain or other benefit to oneself or a benefit to another person.

United States v. Aguilar, 515 U.S. 593, 616-17 (1995) (citation omitted).[11] An unlawful gratuity, on the other hand, does not require a corrupt intent, *i.e.*, a *quid pro quo*. Thus, where the gratuity statute "carries the concept of the official act being done anyway," the bribery law requires the giving of a thing of value to a public official with a specific and corrupt intent *to influence* certain action or inaction that the official may not have otherwise performed. *Brewster*, 506 F.2d at 82.[12] The Court of Appeals grasped this distinction when explaining that although a *quid pro quo* need not be shown to prove a violation of the gratuity statute, the "official act" language is not superfluous:

> [T]o say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. *But the gratuity statute by its terms does still require at least a unidirectional relationship – the gift must be "for or because of" the act.*

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[11] *See also United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) (defining "corrupt" as "incorporating a concept of the bribe being the prime mover or producer of the official act"); *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) (same proposition).

[12] *See also United States v. Nardello*, 393 U.S. 286, 293 n.11 (1969) ("Bribery has traditionally focused upon corrupt activities by public officials."); *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998) ("core difference between a bribe and a gratuity is . . . the quid pro quo").

Pet. App. 8 (emphasis added).[13] Thus, where a bribe intends to elicit a *quid pro quo*, the unlawful gratuity is a reward for either an act "performed" or a gift to make some specific future conduct more likely.[14]

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[13] Other circuit courts have read the gratuity statute to require the gifts to relate to an official decision or action. *See, e.g., United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) ("[a]n illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event"); *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (approving a gratuity jury instruction requiring proof, "beyond a reasonable doubt, that the defendant intended to reward [the public official] for past action or action [the official] was already committed to take"); *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (gratuity statute "presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as a reward for actions the public official has already taken or is already committed to take"); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (under gratuity statute "an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment" and "[t]he proof need not show that the payor intended to exact action by the recipient, although it must show that the payor gave the gratuity because of the act"); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (finding gratuity statute has two components: (1) gifts are made for or because of an official act; and (2) the defendant receives the gift "with a certain guilty knowledge, . . . *i.e.*, with 'knowledge that the donor was paying him compensation for an official act.' "); *United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965) ("The state of mind with which the act is done is an essential element of the [gratuity] offense which the Government must prove."); *cf. Sawyer*, 85 F.3d at 736 ("statute proscribes gratuities motivated by 'official acts' rather than 'official position' ") (construing virtually identical state gratuity statute).

[14] The Independent Counsel's argument that the purpose of the gratuity statute really is to prevent government officials

Here, the District Court improperly interpreted the lack of a "*quid pro quo*" element in the gratuity statute to mean that Sun-Diamond's intent underlying the gifts to Espy was irrelevant. This relieved the Independent Counsel of his burden of proving, beyond a reasonable doubt, that Sun-Diamond intended to give the gifts to Espy "for or because of any official act performed or to be performed." That is, the District Court effectively established an irrebuttable presumption that Sun-Diamond gave gifts to Espy "for or because of an[ ] official act" simply because the company provided Espy with things of value while he was in a position to take official action affecting Sun-Diamond. In doing so, the District Court deprived Sun-Diamond of its constitutional right to present this issue to the jury.[15]

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from receiving unauthorized compensation is belied by the fact that 18 U.S.C. § 203 already explicitly covers unauthorized compensation to government employees. *See* U.S. Brief at 38-39.

[15] The cases relied upon by the Independent Counsel to support his argument that he merely needed to prove at trial that Sun-Diamond gave gifts to Espy for or because of his position are both improperly reasoned and devoid of any substantive analysis of the gratuity statute and its history. *See* U.S. Brief at 12, 38. For instance, in *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978), the Fifth Circuit interpreted the gratuity statute to criminalize status gratuities by relying, in part, upon decisions interpreting the conflict of interest statute, 18 U.S.C. § 203. *See id.* at 480-81. In fact, the court made *no* distinction between the intent requirements of the gratuity and conflict of interest statute – even though the latter statute has no "for or because of an official act" requirement. *Id.* No court that has cited *Evans* as support for the criminalization of status gratuities has noted the court's heavy (and, perhaps, unintended) reliance upon the intent requirement of the conflict of interest statute. Similarly, the Fifth Circuit in *United States v. Bustamante*, 45 F.3d 933 (5th Cir. 1995), merely rested its conclusion upon its earlier

B. The Gratuity Statute's Legislative History Confirms That Congress Intended to Criminalize Only Gifts to Public Officials That Relate to an "Official Act."

It is "unnecessary" to track the statute's legislative history "in light of the plain meaning of the statutory text." *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Nonetheless, the legislative history supports the Court of Appeals' holding and demonstrates that Congress did not intend to criminalize conduct "for or because of the official's position."

As with most legislation, the bribery, gratuity and conflict of interest statutes were subject to legislative compromise. In 1957, Chairman Emanuel Celler instructed the staff of Subcommittee No. 5 of the Committee on the Judiciary

> to prepare a detailed study and analysis of existing Federal conflict-of-interest laws to the end that they might be revised, simplified, and coordinated to prevent improper and unethical practices, while at the same time preserving the dignity of Government service and maintaining its attractiveness to competent men and women.

H.R. Rep. No. 748, 87th Cong., 1st Sess. 7 (1961). Representatives Celler and William M. McCulloch eventually presented identical bills, H.R. 3411 and 3412, respectively, to the 87th Congress. *Id.* Representative John Lindsay offered a similar bill, H.R. 3050, which was the result of a

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confused interpretation of the gratuity statute in *Evans*. *See id.* at 940. Nor do the other cases relied upon by the Independent Counsel even support his position. *See, e.g.*, Sun-Diamond's Brief in Opp. to Pet. for Cert. ("Pet. Opp.") at 5-14.

2-year study of the conflict of interest statutes by a special committee on conflict of interest laws of the Association of the Bar of the City of New York. *Id.* at 8. Finally, Representative Lester Holtzman introduced H.R. 7139, which was proposed by the administration. *Id.*

Section 9(b) of Representative Lindsay's bill, H.R. 3050, proposed language that would have prohibited gifts made to a public official for or because of the official's position or status:

> No person shall give, transfer, or deliver, directly or indirectly, to a Government employee any thing of economic value as a gift, gratuity, or favor if . . . such person would not give the gift, gratuity, or favor *but for such employee's office or position within the Government*[.]

H.R. 3050, Title I, § 9(b).[16] Notwithstanding Representative Lindsay's efforts, there was insufficient interest among the members of the House Judiciary Committee to adopt it. *See Conflicts of Interest: Hearing on H.R. 8150 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 36 (1962) (Statement of Hon. John V. Lindsay).

The final bill submitted by the Antitrust Subcommittee of the House Judiciary Committee, H.R. 8140, was "based upon and contain[ed] features of the provisions of H.R. 3411, H.R. 3412, H.R. 3050, and H.R. 7139." H.R.

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[16] *See also Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3411, H.R. 3412 & H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., 440-42 (1960) (discussion concerning this proposed language); *compare id.* pt. 2 at 756-60 (Letter dated Jul. 6, 1960, from Robert Kramer, Assistant Attorney General, Office of Legal Counsel, to Hon. Emanuel Celler) (proposing "for or because of any official act actually or purportedly performed by him" language).

Rep. No. 748, 87th Cong., 1st Sess. 8 (1961). Instead of prohibiting gifts provided for or because of the official's position, the final Subcommittee bill prohibited "payments to or receipts by public officials . . . 'for' or 'because of' an official act." *Id.* at 16 (to be codified at 18 U.S.C. § 201(f)). The Subcommittee had before it the Lindsay proposal and, while not "rejecting" it outright, nonetheless discarded that language in favor of the "for or because of any official act" language. The Subcommittee certainly knew how to prohibit all gifts for or because of the "employee's office or position," but chose the narrower statutory language instead.

Nor can it be argued that the Subcommittee did not recognize the difference. Senator Proxmire introduced S. 3306, which criminalized gifts to a public official who could benefit the donor through official action (the very conduct the Independent Counsel claims is proscribed by the gratuity statute). *See* S. 3306, 85th Cong. (1958). The staff report to the Subcommittee of the House Judiciary Committee explained that where the proposed gratuity language would prohibit a "reward for an official act," Senator Proxmire's proposed language "goes *further*, and would outlaw gifts to Government officials by interested parties, *irrespective of purpose or intent*." Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts I and II, 72 & n.33 (Comm. Print 1958) (emphases added).

When H.R. 8140 was presented to the Senate, Senator Kenneth B. Keating expressed his view that, "[u]nder existing law the acceptance of a gift by a Federal employee may not be illegal even though the employee's

agency or department does regular business with the donor. This in my opinion is absurd and should be changed." S. Rep. No. 2213, 87th Cong., 2d Sess. 19 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3867 (individual views of Senator Keating). After acknowledging that "[o]bjections were raised at the hearings on H.R. 8140 to the scope of the amendment originally proposed with respect to gifts," Senator Keating proposed to replace the "for or because of any official act" language in H.R. 8140 with language that prohibited gifts for or because of the official's position:

> In order to avoid as much controversy as possible on this issue, . . . the amendment will be modified to reflect these objections. As modified, however, it would still prohibit any Government employee from soliciting or accepting any gift from any person where the employee has reason to believe that such person (a) is seeking to obtain contractual or other business or financial relationships with the employee's agency or (b) conducts operations or activities which are regulated by the employee's agency, or (c) has interests which may be substantially affected by the employee's performance or nonperformance of his official duties.

Id. Because this language would hold public officials strictly liable for soliciting or accepting certain gifts, Senator Keating's proposal was to be civilly, not criminally, enforced. *See, e.g., Conflicts of Interest: Hearing Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 25 (1962) (Letter dated July 23, 1962 from Nicholas deB. Katzenbach, Deputy Attorney General, to Hon. James O. Eastland, Chairman, Senate Judiciary Comm.) ("The section contains no criminal penalties.").

Nicholas deB. Katzenbach of the Department of Justice observed that Senator Keating's proposed amendment was superfluous in light of various administrative regulations. He concluded that "[i]n view of the steps taken by the administration to guard against the acceptance of improper gifts by Government employees, the proposed gifts section does not appear to be necessary." *Id.* at 25-26 (Letter dated July 23, 1962 from Nicholas deB. Katzenbach, Deputy Attorney General, to Hon. James O. Eastland, Chairman, Senate Judiciary Comm.). Significantly, this statement reflected the Department's view that administrative regulations already adequately addressed the conduct covered under Senator Keating's proposed amendment, thus obviating the need for Senator Keating's sweeping prohibitions.

After presenting his comments on the amendment to the Senate, Senator Keating withdrew his amendment for fear that "at this late date in the session attempts to amend the bill might be fatal to its passage." 107 Cong. Rec. 21986-87 (daily ed. Oct. 3, 1962). Although never debated by Congress, it is clear that Senator Keating's proposed amendment – which itself prescribed only civil penalties – never was incorporated into the gratuity statute. Accordingly, this legislative history falls far short from the Independent Counsel's suggestion that the gratuity statute as passed by Congress not only covered the violations reflected in Senator Keating's proposed amendment, but made them *criminally* enforceable.[17]

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[17] *See also* Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts III, IV and V,

C. The Supreme Court Authority Relied upon by the Independent Counsel Supports Sun-Diamond's Position.

1. Despite the Independent Counsel's assertions to the contrary, this Court in *United States v. Brewster*, 408 U.S. 501 (1972), confirmed that the gratuity statute requires some link between the gift and an official act.

Brewster held that the Speech or Debate Clause[18] did not immunize Senator Daniel B. Brewster from prosecution under either the bribery or gratuity statutes even though the alleged gifts were purportedly related to his performance of certain legislative acts. The Court reasoned that "no inquiry into legislative acts . . . is necessary for the Government to make out a prima facie case." *Id.* at 525.

Although not directly addressing the issue raised in this appeal, this Court – emphasizing that a key element to a gratuity violation is the relation of the gift to "an official act" – held that "[t]o sustain a conviction [under the predecessor gratuity statute] it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation *for an official act*." *Id.* at 527 (emphasis added). Justice White in his dissent also found that the predecessor gratuity statute "requires proof of a defendant's receipt, or an agreement or attempt to receive,

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35-70 (Comm. Print 1958) (analyzing then-current administrative regulations concerning gifts, and recommending a draft bill in the form of an amendment to the Administrative Procedure Act providing *civil* penalties for gifts given for or because of a public official's position).

[18] *See* U.S. Const. art. I, § 6.

anything of value 'for or because of any official act performed or to be performed by him. . . .' . . . *[W]hatever the act, the Government must identify it to prove its case.*" *Id.* at 553 (White, J., dissenting) (emphasis added).[19]

2. Similarly, the Independent Counsel's reliance on *Standefer v. United States*, 447 U.S. 10 (1980), is misplaced because (1) the Court in that case did *not* address the "for or because of any official act performed or to be performed" language in the gratuity statute; and (2) in any event, the instructions in *Standefer* support – rather than conflict with – the Court of Appeals' decision.

A jury convicted Standefer of violating the predecessor gratuity statute, 18 U.S.C. § 201(f), by providing free vacations to Niederberger, an Internal Revenue Service agent tasked with auditing the federal income tax returns of Standefer's employer, Gulf Oil Corporation ("Gulf"). The jury separately convicted Standefer of aiding and abetting Niederberger's unlawful acceptance of

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[19] The *Brewster* quotation relied upon by the Independent Counsel – "[t]he Government . . . need not prove any specific act . . . or decision to establish a violation of the statute" – is taken entirely out of its proper context. U.S. Brief at 27 (quoting *Brewster*, 408 U.S. at 528). The Court, in holding that the jury does not have to inquire into the specific legislative acts for which the alleged bribes to Senator Brewster were given, recognized that "evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury." 408 U.S. at 527. In other words, although the jury must find that Senator Brewster knew that the briber intended that the gifts influence, or at least were "for or because of," an official act, the jury would not have to find that Senator Brewster actually acted in accordance with the briber's wishes.

unauthorized compensation under 26 U.S.C. § 7214(a)(2)[20] and 18 U.S.C. § 2. After a divided panel affirmed the convictions, the Third Circuit decided to hear the case *in banc* to address whether Standefer could be found guilty of aiding and abetting Niederberger's § 7214(a)(2) violation notwithstanding Niederberger's acquittal of those charges. *See Standefer*, 447 U.S. at 13-14. When affirming the aiding and abetting conviction, the Third Circuit did not analyze the gratuity statute itself except to restate, in the "FACTS" section, the previous holdings. *United States v. Standefer*, 610 F.2d 1076, 1079-81 (3d Cir. 1979) (in banc).

The Independent Counsel rests his entire *Standefer* argument on part (c) of the second question presented in Standefer's Petition for Writ of Certiorari:

> 2. Does not the interpretation of the *aider and abetter statute* by the court below create a new substantive crime which Congress never intended by:
>
> * * *
>
> (c) *allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent*

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[20] This statute provides in pertinent part that:

> Any officer or employee of the United States acting in connection with any revenue law of the United States . . . (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty [commits a felony].

26 U.S.C. § 7214(a)(2).

> *where the jury after deliberation asked the court whether intent was to be considered in its deliberations.*

Standefer, Petition for Writ of Certiorari ("*Standefer* Pet.") at 3-4 (emphases added).[21] By its terms, the issue relates only to the aiding and abetting and unlawful compensation statutes; it has nothing to do with the gratuity statute. Standefer was *not* charged with aiding and abetting a gratuity violation. *See* 610 F.2d at 1079.

Even more telling is the fact that Standefer did not even cite to 18 U.S.C. § 201 as one of the "Federal Statutes and Federal Issues Involved." *Standefer* Pet. at 3. Nor did this Court take up or address this issue. Instead, the Court "granted certiorari in [*Standefer*] to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense."[22] *Standefer*, 447 U.S. at 11. The Independent Counsel's heavy reliance upon the two-sentence footnote in this Court's *Standefer* decision is thus plainly misplaced.

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[21] Page citations to this petition, Standefer's merits brief and the *Standefer* appendix are to the version of the cited document that is available through LEXIS. *See* U.S. Brief at 28 n.9.

[22] The Independent Counsel relies upon the fact that Standefer argued in his Supreme Court merits brief that the trial court "took away from the consideration of the jury the issue of corrupt intention." U.S. Brief at 29. But Sun-Diamond never contended, nor does it now contend, that the prosecutor must prove a "corrupt" intent to obtain a gratuity conviction as that is the requisite intent for bribery. *See* 18 U.S.C. § 201(b). Nor does the prosecutor have to prove a *quid pro quo* as in a bribery case. *See* U.S. Brief at 30.

Nevertheless, the Independent Counsel asserts that Question 2(c) somehow addresses the same issue that is raised here. *See* U.S. Brief at 29. But this cannot be the case. After the jury asked its question, the court instructed that the gift "has to be for the purpose of giving . . . things to the agent *on account of the audit* of these returns and his position with respect thereto." *See Standefer* Pet. at 68 (emphases added). Even assuming, *arguendo*, that Question 2(c) addresses the gratuity statute – and not the aiding and abetting and unlawful compensation statutes – Sun-Diamond *agrees* with this jury instruction. This is because the court instructed the jury to find that the gift was not only for or because of the official's position *but also* "on account of the audit" of the tax returns. Because an audit is an "official act," Standefer could not have complained that this instruction was in error.

At most, this Court upheld two instructions that addressed the requisite criminal intent under the aiding and abetting statute and § 7214(a)(2). The two instructions at issue were: (1) the government did not have to show that Standefer specifically intended to enter into an agreement with Niederberger to further an unlawful purpose; and (2) the jury could not consider the alleged facts that the audits conducted by Niederberger were correct and that Gulf actually paid more than $150 million in taxes as a result of those audits. *See, e.g.*, Brief for Petitioner at 16, 17, 19.

But even assuming, *arguendo*, that Standefer's arguments somehow concerned the gratuity statute, which they did not, Sun-Diamond is not arguing here that the Independent Counsel was required to show either an *agreement* between Espy and Sun-Diamond or that Espy

was influenced in any way as a result of the gifts. The Court of Appeals thus correctly found that *Standefer* has no bearing upon the issues in this case. *See* Pet. App. 11 n.5.

Finally, the *Standefer* district court instructions more closely parallel the Court of Appeals' than the Independent Counsel's interpretation of the gratuity statute. *See id.* The *Standefer* instructions make clear that the jury was required to find that the gifts (paid vacations) were related to *official acts* (favorable tax audits). The district court specifically instructed the jury that:

> It is sufficient if the defendant made these payments because of [a] desire to create a better atmosphere with Niederberger *with respect to the performance of the audit or appreciation for a speedy or favorable audit.*

Instructions at 16-17 (emphasis added). Payments for a "better atmosphere" were insufficient; instead, the district court required a nexus to a specific act. *See, e.g.*, Instructions at 15-20; *id.* at 28-29 (defendant's requested instructions Nos. 7 and 8); *id.* at 46-50; *see also* Pet. Opp. at 19 n.19 (quoting instructions). A thorough reading of these instructions finds none that permitted the jury to convict on the Independent Counsel's theory in this case that gifts by a regulated entity to a public official motivated solely by the official's status or position run afoul of the statute, regardless of whether the donor had any intent to affect or to reward official conduct.

To be certain, this Court's vague, two-sentence comment – whether or not *dictum* – did not intend to bless every word of the instructions. Even the Independent Counsel concedes that "the precise extent to which this

Court ruled on" the requisite intent under the gratuity statute "is unclear from the briefs on the merits and the Court's single footnote." U.S. Brief at 31.

II. The Gratuity Statute Proscribes Rewards for Past Official Action and Gifts to Increase the Likelihood of One or More Specific, Favorable Acts.

While this Court may not reach or define the outer boundaries of unlawful gratuities,[23] Sun-Diamond submits its views below to respond to the articulated views of both the Independent Counsel and the Department of Justice, respectively. *See generally* U.S. Brief at 17-32; DOJ Brief at 19-22.

The Court of Appeals correctly determined that "generalized sympathy" does not constitute an "act," and that the government, to convict under the statute, must prove that the donor intended either "to reward some past *concrete* official act[ion]" or "to increase the likelihood of one or more, *specific*, favorable acts." Pet. App. 7, 8 (emphases added).[24] With neither reference to nor analysis of the statute itself, the Department of Justice objects to the Court of Appeals' view that the gratuity statute

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[23] The discrete issue presented in this appeal is whether the District Court's instructions were erroneous, thereby precluding the jury from deciding the ultimate question of Sun-Diamond's intent underlying its gifts to Espy – whether the gifts were "for or because of any official act performed or to be performed."

[24] *See also* Pet. App. 8 (gratuity statute "carries the concept of the official act being done anyway, but the payment only being made *because of a specifically identified act.*") (quoting *Brewster*, 506 F.2d at 82) (emphasis by Court of Appeals).

does not proscribe gifts for or because of "official goodwill." *See* DOJ Brief at 19-22. Analysis of the statute, however, confirms the accuracy of the Court of Appeals' understanding.[25]

1. When read as a whole, the plain statutory language prohibits only gifts given with the intent to reward or to influence some specific act or acts. A gift "for or because of any official act performed" prohibits rewards for "concrete" official conduct because *past* action cannot be hypothetical. The use of the verb auxiliary "to be" in modifying the past participle "performed" allows the statute also to cover specific, *future* official acts, *i.e.*, the forward-looking gratuity. To interpret the statute as prohibiting gifts for mere "generalized sympathy" without a connection to any specific act disregards the plain statutory language, which, through the connector "or," links both "performed" and "to be performed" with the term "official act." Put simply, a gift "for or because of any official *act* . . . to be performed" is something more than a gift to keep the official happy or for goodwill.[26] (Emphasis added.)

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[25] Sun-Diamond does not quibble with the notion that gifts for multiple official acts are proscribed by the gratuity statute, provided the acts are identifiable and the nexus established. *See* Pet. App. at 13-14; *cf. Jennings*, 160 F.3d at 1014 ("the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that' ").

[26] *See* Pet. App. 10 ("if Douglas furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities").

That Congress chose the verbal auxiliary "to be" – as opposed to using the term "may," "can," "might" or "could" – to cover forward-looking gratuities is also significant. "To be" is defined to mean "become supposed" or "become destined," and "express[es] futurity, arrangement in advance, or obligation." *Webster's Third New International Dictionary* 189 (1993).[27] Thus, an act "to be performed" is one that will, with some degree of certainty, come to fruition. In fact, interpreting this statute as prohibiting gifts for acts that may, can, might or could be performed ignores the entire phrase "performed or to be performed" by prohibiting *all* gifts "for or because of any official act" rather than *only* gifts "for or because of any official act *performed or to be performed*." (Emphasis added); *see, e.g., Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). Congress, which added the phrase "performed or to be performed" as words of limitation, intended to exclude from the contours of the statute those instances where there is a mere *chance* that, at some undisclosed

[27] Title 18 of the United States Code contains several provisions using the phrase "to be performed." In each case, the phrase in context necessarily implies that some specific act will be performed. *See, e.g.*, 18 U.S.C. §§ 116, 372, 1020, 4045; *see also* Fed. R. Crim. P. 25(b) ("If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties *to be performed* by the court after a verdict or finding of guilt. . . . ") (emphasis added); *cf. United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) (interpreting phrase "an act to be done" in 18 U.S.C. § 2(b) (aiding and abetting) as meaning, *inter alia*, "that defendant have the specific intent of 'bringing about' the forbidden act").

time in the future, the official may be able to benefit the donor somehow.

2. The Department of Justice nonetheless argues, without support, that the phrase "for . . . any official act . . . to be performed" can mean "for official goodwill":

> Where a federal official has a continuing capacity to act on matters that will affect a particular entity, the regulated party has an obvious interest in keeping the public official favorably disposed as a general matter, regardless of the outcome of any particular decision. *The generation and maintenance of such official goodwill falls within the statute*, for ultimately a favorable attitude may be manifested in specific official acts.

DOJ Brief at 20 (emphasis added).[28] For the reasons discussed above, this "X = Y" argument is hardly more persuasive than the one pressed by the Independent Counsel. *See* discussion, *supra*, at Section I.

If the statute means what it says, then the donor *must* have had a particular act (or acts) in mind when presenting the gift to the public official, and the factfinder may not be instructed to find that the gift was for or because of an official act simply because the recipient was in a position to act in a manner affecting the donor. The prosecutor should have to prove every element of the offense, including proof beyond a reasonable doubt that the donor gave the gift for or because of an "official act"

[28] *Compare* Pet. App. 9 ("we have refused to allow the official act requirement to be satisfied by some vague hope of inducing warm feelings toward the donor") *with* U.S. Brief at 22 (the gratuity statute "reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be in a position to act favorably to the giver's interest").

either "performed or to be performed." *See, e.g., Jennings*, 160 F.3d at 1021 n.5 ("Clearly, goodwill gifts are neither bribes nor gratuities, since they are made neither with the intent to engage in a 'relatively specific quid pro quo' with an official nor 'for or because of' a specific official act (or omission)."); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (the gratuity must have been "made because of a specifically identified act").

Nor does the hypothetical posited by the Department of Justice accurately illustrate its position. That hypothetical read as follows:

> [I]f an organized crime figure furnishes gifts to a United States Attorney, hoping that the United States Attorney will decline prosecution (or prosecute less vigorously) in the event that the donor or one of his subordinates comes to the attention of law enforcement authorities, the gifts would be made "for or because of" (potential) official action.

DOJ Brief at 20-21. This may in fact be an example of bribery if the jury finds that the "organized crime figure" intended to elicit a *quid pro quo* by giving things of value for the direct purpose of influencing the U.S. Attorney to offer lenient prosecutorial treatment in the future. Such conduct may also constitute a gratuity because lenient prosecutorial treatment *is* most assuredly "specific action," and, under the hypothetical facts, there may well be a high degree of certainty that the U.S. Attorney will be in a position to take the contemplated action.

In contrast, there are real-life, every day examples of conduct that would inadvertently be criminalized under the "gift for official goodwill" reading of the gratuity statute adopted by the Department of Justice. Judges, lawmakers and other public servants live in a world

surrounded by people – people with whom they have personal relationships – who themselves believe that maintenance of the relationship could confer some benefit upon them at some unknown time. Public servants do not live, nor do we want them to live, in total isolation. Consequently, friends, relatives, neighbors and acquaintances engage, go out with, and bestow goodwill gifts upon them, just as friends, family members, neighbors and acquaintances are prone to do. But who is to say that the giving of such gifts (even in a reciprocated relationship) is purely out of friendship or, alternatively, *primarily* friendship while containing *some* small element of hope or expectation that the giving of the gift and the cultivation or maintenance of the friendship might someday inure to the donor's benefit:

> A lawyer has taken a lawyer-friend to baseball games for years. Now that the friend has become a judge, do the baseball games become an unlawful gratuity, because the donor understands that maintenance of the friendship and the judge's goodwill *might* somehow inure to his advantage? Does it matter if he has no case pending before the judge but might someday have a case before him? *See* Pet. App. 10-11 & n.4.
>
> A shopkeeper, a former police officer, is friends with federal law enforcement agents. Now that one of these friends lives in the neighborhood where his store is located, do the gifts of friendship now constitute a felonious act because maintenance of the relationship might, in the donor's mind, somehow lead to more police protection?

> And to recast the hypothetical offered by the Department of Justice: A law-abiding citizen seeks to maintain a long-held friendship with the newly-appointed U.S. Attorney, believing in some small part that generation of some good-will on the part of the U.S. Attorney toward the citizen might somehow result in beneficial, but unspecific, assistance sometime in the future.

Under the Department of Justice's standard, these citizens could be charged with a felony that carries up to a two-year jail term. But the gifts are so remotely linked to "any official act . . . to be performed" that to render the gift an unlawful gratuity essentially rewrites the statute to say "for or because of any generalized feelings of goodwill toward the donor that might, at some undisclosed time in the future, manifest itself in the form of some purely hypothetical official act." The Department of Justice provides no support for a statutory interpretation that yields such anomalous results. Instead, Congress' employment of the "performed or to be performed" language saves the statute from swallowing up and criminalizing such a broad array of conduct.[29]

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[29] Several circuit courts give a symmetrical reading to the "performed or to be performed" language by interpreting more strictly the gratuity statute as prohibiting only backward-looking and forward-looking *rewards* for official action, leaving the bribery statute to cover instances where the donor acts with a corrupt intent *to influence* one or more official acts. *See, e.g., United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) ("illegal gratuities, which typically follow the act for which they are paid, may be conveyed before the occurrence of the act (so long as the payor believes the official has already committed himself to the action)") (citations omitted); *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (approving gratuity jury instruction requiring prosecutor to "prove, beyond a reasonable

3. This is not to say, however, that gifts given otherwise than as provided by law to public officials go unpunished. In fact, gifts for or because of an official's

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doubt, that the defendant intended to reward [the public official] for past action or action [the official] was already committed to take"); *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (gratuity statute "presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as a reward for actions the public official has already taken or is already committed to take"); *see also United States v. Strand*, 574 F.2d 993, 995 n.2 (9th Cir. 1978); *United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965).

In fact, Congress used the phrase "to influence" in the bribery statute, but omitted that phrase from the gratuity statute, using the phrase "for or because of" instead. *Compare* 18 U.S.C. § 201(b) *with id.* § 201(c)(1)(A). And when Congress intended to prohibit the giving or acceptance of gifts motivated by *either* a desire to reward *or* to influence, it has specifically so provided. *See* 18 U.S.C. § 1954 (analogous gratuity statute prohibiting certain persons associated with employee benefit plans from receiving or agreeing to receive gifts "*because of or with intent to be influenced with respect to*," certain "actions, decisions, or other duties") (emphasis added).

The pertinent legislative history likewise suggests that payments "for" official action means that the donor intends to reward, *but not to influence*, official conduct. *See* Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts I and II, 72 (Comm. Print 1958). Finally, the view that forward-looking gratuities prohibit only rewards is supported by the fact that the phrase "or to be performed" was added only as a "very *minor* suggestion[ ], perhaps hardly worth mentioning[.]" *Id.* at 87-88 (Statement of J.H. Macomber, Jr.) (emphasis added).

position are presently prohibited by administrative regulations and Congressional Rules. *See, e.g.*, 5 U.S.C. § 7353; 5 C.F.R. 2635.202(a) (prohibiting executive branch employees from, directly or indirectly, soliciting or accepting gifts "because of the employee's official position"); Rule XXXV of the Standing Rules of the Senate (amended July 18, 1995); Rule XXVI of the Rules of the House of Representatives (amended January 6, 1999); *see also* 9 C.F.R. § 203.2 (Department of Agriculture regulation concerning gifts from packers of meat to government employees). Moreover, debarment and other administrative sanctions act to deter government officials and regulated parties from running afoul of ethics policies concerning government officials. And, as noted above, the very existence of these administrative regulations prompted the Department of Justice, at the time Congress was considering different versions of the competing gratuity bills, to conclude that the more sweeping prohibition contained in the Keating Amendment was unnecessary. *See* discussion, *supra*, at 29.

4. Even assuming that the gratuity statute *could* permissibly be read, as the Independent Counsel and the Department of Justice have apparently read it, to prohibit gifts merely for official goodwill, then this Court should apply the rule of lenity to give the statute the more strict interpretation adopted by the Court of Appeals. The rule of lenity doctrine provides that a court should strictly construe penal laws in favor of the accused out of deference to the legislative branch and to provide fair warning to the public:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress . . . and out of concern that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed[.]"

United States v. Aguilar, 515 U.S. 593, 600 (1995); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *cf. United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., dissenting) ("In my view it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history.").

5. Finally, to the extent that the Independent Counsel or the Department of Justice believes that the actual terms of the gratuity statute provide for a standard that is too lenient – or that their statutory interpretations further valid policy objectives – this is an issue for Congress, not for this Court.[30]

III. The District Court's Error Was Far From Harmless.

Before addressing the Independent Counsel's harmless error argument on the merits, it is important to clarify some procedural points. First, the Independent Counsel never sought review by this Court on the issue of harmless error, nor did this Court ever grant such review. Second, the Independent Counsel never raised or

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[30] *See, e.g., Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805, 811-12 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread."); *United States v. Mezzanatto*, 513 U.S. 196, 216 n.1 (1995) (Souter, J., dissenting) ("If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it.").

otherwise preserved this issue below. And, with the exception of a swift recognition that the District Court's "error cannot be called technical or harmless," the Court of Appeals never reached the harmless error issue. Pet. App. 13. Accordingly, the Independent Counsel has waived this argument. At most, this Court should remand the issue to the Court of Appeals.[31] As reflected below, however, even a remand is not necessary as the District Court's error cannot be deemed harmless.

The Independent Counsel argues:

> By returning a guilty verdict, the jury necessarily rejected respondent's theory of defense and found beyond a reasonable doubt that the gifts were motivated by the fact that the Secretary of Agriculture exercised regulatory authority over respondent's business. That finding was 'functionally equivalent' to finding that respondent gave the gifts for or because of Espy's official acts."

U.S. Brief at 44 (citation omitted). But even if the jury rejected Sun-Diamond's defense that the gifts were not given entirely out of friendship, that is not the same as finding that they were given "for or because of an official act." All that can be deduced from the verdict is that the jury found either that Sun-Diamond's gifts were motivated (at least in part) because of Espy's official position, or alternatively, that the gifts were given "while [Sun-Diamond] had issues before the" USDA. Pet. App. 88.[32]

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[31] *See, e.g., Rose v. Clark*, 478 U.S. 570, 584 (1986).

[32] *See, e.g.*, Pet. App. 87 ("The government need not prove that the alleged gratuity was linked to a specific or identifiable official act *or any act at all.*") (emphasis added); *id.* at 88 ("the government has to prove that Sun-Diamond Growers of

Neither is sufficient under the statute to convict. Conversely, the Independent Counsel did *not* have to prove – and the jury did *not* find – that Sun-Diamond intended to give a thing of value to Espy "for or because of an[ ] official act." By taking this issue away from the jury, the District Court violated the company's constitutional rights under both the Fifth and Sixth Amendments:

> What the fact-finder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged . . . and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements[.] . . . It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.

Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993) (citations omitted).

Sun-Diamond was seriously prejudiced as a result of these constitutional violations. As discussed earlier, Busboom, Sun-Diamond's former President, testified that the purposes of the company's gifts to Espy were: (1) to foster Douglas' information network; (2) to develop personal relationships with other high-level government officials; and (3) to enhance Douglas' status in the agricultural and lobbying communities by being seen with a Cabinet Secretary. *See* discussion, *supra*, at 16-17. He also testified that the gifts were not to "purchase . . .

California gave knowingly and willingly Secretary Espy things of value while it had issues before the" USDA).

favor" or "influence." C.A.J.A. at 223. Busboom's testimony, while perhaps tending to support a finding that the gifts were for or because of Espy's *position*, also supports a finding that the gifts were *not* for or because of any official *act*. In light of the erroneous instructions, the Independent Counsel's representative at trial relied heavily upon this very testimony in closing argument, contending that Sun-Diamond violated the gratuity statute precisely because (and *only* because) the gifts had a business purpose.[33] Invoking the imprimatur of the court, the Independent Counsel argued that these gifts, although unrelated to official acts, "clearly fall[ ] exactly within the instructions that the Court gave about what is an illegal gratuity." Trans. at 901.

Not only did the District Court take from the jury the ultimate issue of Sun-Diamond's intent, but the Independent Counsel actually used what should have been *exculpatory* evidence to *convict* the company. A properly instructed jury might have acquitted Sun-Diamond of the gratuity charges by concluding that, in light of Busboom's testimony, the company's gifts to Espy were *not* "for or because of any official act," even if given with a business purpose. But one can only guess as to whether the jury, if properly instructed, would have reached this conclusion because the *only* defense allowed to be presented to the jury was that Sun-Diamond acted out of pure friendship.

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[33] *See, e.g.*, Trans. at 899-903, 906; *see also* C.A.J.A., Tab 3 at 964-68, 972-74; C.A. Opp. Brief at 4-7 ("A key component of Richard Douglas' position 'was to maintain relations with key decision-makers at the Department of Agriculture and other agencies in Washington.' ") (citation omitted).

Accordingly, the Independent Counsel's argument that the jury rejected Sun-Diamond's "friendship" defense is not the issue. Rather, the real question is whether the Court can find that the District Court's irrebuttable presumption of unlawful intent – which entirely precluded the jury from considering Sun-Diamond's other (perhaps even stronger) defense that its gifts were unrelated to any official acts – "played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281.

This Court cannot say that "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 583 (1986) (citation omitted). This case is thus distinguishable from *Rose* – a habeas corpus case relied upon by the Independent Counsel – which held that "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Id.* at 579.[34] Sun-Diamond therefore submits that the District Court's virtual presumption of guilt cannot possibly be deemed harmless error when, in this country, defendants must be *proven* guilty beyond a reasonable doubt, and they are presumed *innocent* until such time.

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[34] *Cf. Sullivan*, 508 U.S. at 277 ("although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence").

CONCLUSION

For the foregoing reasons, Sun-Diamond respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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